INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing a membership of nearly three million businesses and organizations of every size, in every industry sector and geographical region of the country.[1] A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community.

The Chamber has a substantial interest in the issue presented in this case: the preemption of state-law securities class actions brought on behalf of "holders" of securities. Securities class action litigation imposes an enormous toll on the national economy, affecting virtually every public corporation in America and costing American businesses billions of dollars in settlements every year. A recent study concluded that, over a five-year period, the average public corporation faces a 10% probability of facing at least one securities class action lawsuit. Buckberg *et al.*, NERA, *Recent Trends in Securities Class Action Litigation: Are WorldCom and Enron the New Standard?* 2 (July 2005).

Congress has enacted legislation to rein in some of the worst abuses of securities class action litigation, assuring that class actions involving nationally traded securities are heard in federal court and governed by federal standards. In this case, however, the Second Circuit approved an attempt to circumvent these standards through use of state law as the

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

foundation for a particularly abusive and speculative form of litigation. The Chamber believes that the experience of its members makes it well situated to address the harm that will follow from the Second Circuit's approach.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. It has long been settled that private litigants may not bring actions seeking damages for fraud under the Securities and Exchange Commission's Rule 10b–5, 17 C.F.R. § 240.10b–5, unless they were purchasers or sellers of securities. The question in this case is whether a person who was *not* a purchaser or seller, but instead claims that he was induced by fraud to "hold on" to his shares, may bring a national class action based upon state law. As petitioner demonstrates in some detail in its brief, the plain language of the Securities Litigation Uniform Standards Act of 1998 (the "SLUSA"), Pub. L. No. 105–353, 112 Stat. 3227 (codified as amended in various sections of 15 U.S.C.), says that the answer to that question is no.

The unequivocal language of the SLUSA preempts virtually all class actions based upon state law that allege fraud relating to nationally traded securities. The statute does not say, as the Second Circuit believed, that only suits involving purchasers and sellers are preempted. Instead, it broadly provides that *no* class action may be brought under state law by *any* private party alleging fraud *in connection* with the purchase or sale of a covered security. The alleged fraud here surely was one "in connection" with such a purchase or sale under the broad reading of the term that repeatedly has been propounded by this Court: the whole point of the assertedly fraudulent statements challenged by respondents was to influence trading in the affected securities. Respondents' claim therefore cannot be squared with the unambiguous language of the SLUSA.

2. The straightforward terms of the statute accordingly are enough to dispose of this case. But to the extent that

there is any doubt on that score, the statutory background and policy confirms that the SLUSA was meant to preempt state-law "holder" class actions. The SLUSA was the culmination of a more extensive congressional effort to combat abusive practices that infected the process of securities fraud litigation. Congress determined that meritless securities suits often succeeded in coercing settlements – a process that did investors little good, but that imposed enormous costs on issuers, shareholders, and the national economy. Congress responded by enacting the Private Securities Litigation Reform Act of 1995 ("the PSLRA"), Pub. L. No. 104–67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77a *et seq.*), which broadly reformed the process of federal securities litigation by curbing the practices that were most likely to produce extortionate settlements. When plaintiffs attempted to circumvent the PSLRA by bringing national class actions in state court under state law, Congress enacted the SLUSA's preemption provisions.

Read against this background, the Second Circuit's holding plainly will frustrate the unambiguous intent of the SLUSA. The state-law holder claims that were validated by the decision below present the very dangers of abuse that led to enactment of the PSLRA, and that Congress sought to nail into their coffins with the SLUSA. Indeed, such suits are *especially* susceptible to misuse as a vehicle to extract extortionate settlements because they allege speculative injuries that typically are proven through use of oral testimony. Congress could not have intended to allow national class actions asserting such claims to survive the SLUSA.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE SLUSA PREEMPTS "HOLDER" CLASS ACTIONS BASED UPON STATE LAW

Petitioner shows in some detail how the Second Circuit's decision is inconsistent with the plain language of the

SLUSA. Rather that repeat that argument, the bulk of this brief will make a related point: the background and policy of the SLUSA show that Congress meant the broad words of the statute to be interpreted broadly. The SLUSA was intended to prevent plaintiffs from circumventing the goals of the PSLRA, which reformed the process of securities litigation in an effort to combat serious and well-documented abuses that were injuring investors, issuers, and the national economy as a whole. The Second Circuit's decision in this case, which disregards the manifest congressional intent by allowing an important category of such abusive claims to proceed, will frustrate that goal.

Before addressing the congressional policy, however, it is worth pausing to emphasize that the plain language of the SLUSA *does* resolve this case. That language is clear and unequivocal, providing that

> [n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1); 15 U.S.C. § 77p(b). The statute does *not* say, as the Second Circuit would have it, that only suits by purchasers or sellers are preempted; instead, it declares that *no* covered class action based on state law of any kind may be maintained in *any* court by *any* private party alleging fraud *in connection with* the purchase or sale of a security.[2]

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[2] The breadth of the statutory language is suggested by SLUSA's definition of preempted "covered class action," which is broader than that of Rule 23 of the Federal Rules of Civil Procedure. See 15 U.S.C. § 77p(f)(2); S. Rep. No. 105–182, at 8 (1998) ("[I]t re-

There is no doubt that the SLUSA's "in connection with" language, which was borrowed from Section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), is broad enough to reach the conduct alleged in this case. It has long been recognized that, as the Second Circuit itself put it in its seminal decision in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc), the "in connection with" requirement is satisfied when a misrepresentation is made "in a manner reasonably calculated to influence the investing public." And this Court has since repeatedly confirmed that, under the "in connection with" language, "[i]t is enough that the scheme to defraud and the sale of securities coincide." *SEC* v. *Zandford*, 535 U.S. 813, 822 (2002). See, *e.g.*, *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 (1971) ("in connection with" includes deceptive practices "touching" the sale of securities); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 476 (1977) (same). Here, it can hardly be denied that the conduct alleged by plaintiffs – dissemination of false analyst reports to the trading public – satisfies this standard.

Nor is there room to impose extra-statutory limits on the scope of the SLUSA's language. The statute contains three express, narrowly defined exceptions from preemption (see 15 U.S.C. § 78bb(f)(3)); suits by holders of securities, which are of an entirely different character from those exceptions, are not one of them. And the Second Circuit plainly erred in its belief that, because only purchasers and sellers of securities have standing to bring private actions under the SEC's Rule 10b–5, 17 C.F.R. § 240.10b–5, the SLUSA likewise preempts only class actions brought by purchasers and sellers. The purchaser/seller limitation is based on the policy of the Rule 10b–5 implied right of action and "does not stem

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mains the Committee[']s intent that the bill be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.")

from a construction of the phrase 'in connection with the purchase or sale of any security.'" *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 284 (1992) (O'Connor, J., concurring in part and concurring in the judgment). See *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1998) (Section 10(b) "does not confine its coverage to deception of a purchaser or seller of securities"). That is why the purchaser/seller limitation does not affect the SEC's enforcement authority or the United States' prosecutorial authority under Section 10(b). See, *e.g.*, *Zandford*, *supra*; *United States* v. *Naftalin*, 441 U.S. 768, 774 n.6 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 751 n.14 (1975).

The SLUSA's language thus is dispositive. The respondents' suit here is a "covered class action." It is based upon the "statutory or common law" of a state. It claims a "misrepresentation or omission of a material fact." And – because those alleged misstatements plainly coincided with (and supposedly were intended to induce) trading in securities – the misstatements were made "in connection with" the purchase or sale of securities. That is enough to dispose of this case.

II. THE POLICY AND UNAMBIGUOUS CONGRESSIONAL INTENT UNDERLYING THE SLUSA PREEMPTS "HOLDER" CLASS ACTIONS BASED UPON STATE LAW

Respondents' claim accordingly should not survive application of the statutory language. But to the extent that there is any doubt on that score, the statutory background and policy confirm that the SLUSA was meant to preempt state-law holder class actions. The SLUSA was intended to effectuate the congressional intent to prevent certain abusive practices that had bedeviled securities litigation prior to enactment of the PSLRA. And state-law holder suits, of the type at issue here, present precisely the dangers of abuse that Congress had in mind.

A. The Pressure To Settle Even Meritless Securities Class Actions Imposes An Enormous Toll On The National Economy

In determining Congress's goal in enacting the SLUSA, it is helpful to begin with the problems that prompted enactment of legislation reforming securities litigation. As this Court has long recognized, securities fraud litigation presents "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Such lawsuits contain unique elements that encourage defendants to settle even insubstantial claims – and that, as a consequence, encourage plaintiffs to file them. This phenomenon is a function of the incentives faced by both issuers and plaintiffs. See generally Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986). These incentives, in turn, stem from asymmetries in the risks and rewards of litigation.

1. The direct costs of litigation – especially the process of discovery – impose enormous burdens on defendants. See, *e.g.*, Kassis, *The Private Securities Litigation Reform Act of 1995: A Review of Its Key Provisions and an Assessment of Its Effects at the Close of 2001*, 26 SETON HALL LEGIS. J. 119, 124 (2001) (describing the discovery process as "financial blood letting"). Moreover, the lost productivity and business disruption caused by the discovery process may "dwarf the expense of attorneys' fees." Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 953 (1999); see also *Blue Chip Stamps*, 421 U.S. at 742–743 (describing "the threat of extensive discovery and disruption of normal business activities" posed by securities class actions); S. Rep. No. 104–98, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693.

Wholly aside from the costs of litigation, the sheer size of the damages demanded in national class actions makes it attractive for defendants to forgo the adversarial process and settle even meritless suits to avoid the prospect of ruinous liability. The arithmetic is implacable: a 10% chance of facing a $300 million judgment makes a settlement of $29.9 million look attractive. Joint and several liability presents the same quandary to peripheral actors, such as underwriters and accountants, who might be named defendants because of their deep pockets and thus be exposed to liability for a grossly disproportionate share of the damages. See H.R. Conf. Rep. No. 104–369, at 37–38 (1995); S. Rep. No. 104–98, at 5, 9.

This is so regardless of the strength of the plaintiffs' claims. An influential study found that the costs and risks of litigation made the merits of securities suits largely irrelevant to the decision to settle. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–517 (1991).[3] Instead, the best predictors of whether suit would be brought and the size of the ultimate settlement were declines in stock price and the amount of the defendant's insurance coverage. *Id.* at 550.[4] The hearings

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[3] See also Garry *et al.*, *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 287 n.98 (2005) (citing additional studies); Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979–980 (1996) (evaluating proxies for merit of pre-PSLRA securities fraud class actions arising out of IPOs, such as underwriter quality and insider sales, and concluding that "most securities-fraud class actions are, in fact, frivolous"); Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727, 742–743 (1995) (reviewing a sample of settlements in which 23 percent of the settlements were for less than $2 million, suggesting that the suits held only a nuisance value).

[4] See also Thompson & Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859,

that preceded the enactment of the PSLRA were replete with testimony and studies supporting the proposition that securities suits commonly followed a drop of 10 percent or more in a security's price and that most suits were settled within the boundaries of the applicable insurance policy.[5]

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894 (2003) (reporting that most complaints filed in 1999 were based on stock market drop); Martin *et al.*, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 STAN. J. L. BUS. & FIN. 121, 153, 157 (1999); Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 949–50 (1993) (reporting that in one industry, a class action was filed to challenge *every* IPO where the stock traded below the IPO price after 15 months). The rise in securities class action suits against high-technology firms after the bursting of the stock market bubble in 2001 mirrors a similar spike in suits following a downturn in the Hambrecht and Quist High Technology Index in 1983. See Garry *et al.*, *supra*, 49 S.D. L. REV. at 290.

[5] See, *e.g.*, *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs* ("*1993 Senate Hearings*"), 103d Cong., 1st Sess. 10, 12 (1993) (statement of Edward R. McCraken, President and CEO of Silicon Graphics, Inc.) (testifying that a lawsuit was filed several weeks after Silicon Graphics, Inc.'s 10 percent drop in stock price that resulted from the company's lower than expected earnings); see also *Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Sec. of. the S. Comm. on Banking, Hous., and Urban Affairs*, 103d Cong., 2d Sess. 190 n.37 (1994) (discussing technology industry representatives' reports that strike suits would be filed whenever stock price decreased 10% or more). Numerous SEC Chairmen and Commissioners echoed these concerns and have urged reform of securities class actions. See *Securities Litigation Reform Proposals: Hearings on S. 240, S. 667, and H.R. 1058 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs* ("*Reform Act Senate Hearings*"), 104th Cong., 1st Sess. 229 (1995) (then-Chairman Arthur Levitt); *id.* at 239 (former Acting Chairman Charles C. Cox); *id.* at 49–50 (former Commissioner J.

2. These insubstantial strike suits are of little benefit to shareholders – even to shareholder plaintiffs. Every delayed announcement of accurate firm information produces both winners (who sold during the period of inflation) and losers (who bought then and sold after disclosure of the truth). See Posner, ECONOMIC ANALYSIS OF THE LAW 489 (5th ed. 1998). "Over the long run, any reasonably diversified investor will be a buyer half the time and a seller half the time" and will not benefit from "a legal rule that forces his winning self to compensate his losing self over and over." Easterbrook & Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 340 (1991); see also Thakor, *et al.*, U.S. Chamber Institute for Legal Reform, *The Economic Reality of Securities Class Action Litigation* 1 (2005), available at http://www.instituteforlegalreform.com/pdfs/EconomicRealityNavigant.-pdf (explaining that diversified institutional investors in particular are for this reason overcompensated as a result of litigation). Even worse, such wealth transfers entail significant transaction costs. To the extent that class members still own shares in the issuer, "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up." Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996); see also Coffee, *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse* Broudo, 60 BUS. LAW. 533, 542–543 (2005); Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921–922; Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638–639 (1985).

Carter Bresse, Jr.); S. Rep. 104–98, at 21 (noting testimony of former Chairman David S. Ruder); *id.* at 16 (noting testimony of former Chairman Richard C. Breeden); Shad, *Introduction to Securities Class Actions: Abuses and Remedies* 1 (1996); Grundfest, *supra.*

More profoundly, the costs of abusive litigation are felt throughout the national economy. These costs are borne disproportionately by the most innovative and entrepreneurial companies, which are targeted because the volatility in their share price attracts the attention of the plaintiffs' bar.[6] And abusive securities class action litigation has enormously destructive ripple effects. The risk of out-of-control liability deters competent individuals from serving as independent directors on corporate boards. S. Rep. No. 104–98, at 21. Accounting firms, often named as deep-pocket defendants, become less willing to perform auditing services (*id.* at 21–22) – especially for "newer and smaller companies" that are for that reason less likely to be able to obtain high-quality professional services, as "business failure would generate securities litigation against the professional, among others." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994), *abrogated by* 15 U.S.C. § 78t; H.R. Rep. No. 104–50, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets," and "businesses suffer as auditors and directors decline engagements and board positions"); Alexander, *supra*, 43 STAN. L. REV. at 570–573. D&O insurers must increase premiums or stop underwriting policies altogether. S. Rep. No. 104–98, at 21.

Furthermore, because any statement that later is proven inaccurate or any prediction that fails to come true could form the predicate for an allegation of fraud, the prospect of liability chills corporate disclosures of information that could be useful to investors, thus directly frustrating the disclosure objectives of the federal securities laws. See *id.* at 15–16; Easterbrook & Fischel, *supra*, at 339 (noting that because a

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[6] See *Reform Act Senate Hearings*, *supra*, at 109 (testimony of George Sollman on behalf of the American Electronics Association) (estimating that about half of the top 100 companies in Silicon Valley have been subjected to a securities class action lawsuit at least once).

firm that discloses information "inevitably takes the risk of excessive optimism and excessive pessimism," a "rule penalizing excesses in either direction would lead to silence" about a company's prospects). The risk of liability also muzzles corporate managers' communications with analysts, which are "necessary to the preservation of a healthy market." *Dirks* v. *SEC*, 463 U.S. 646, 658–659 (1983); see also SEC, Release No. 33–7881, 65 Fed. Reg. 51716, 51718 n.19 (2000) ("fear of legal liability" "chill[s]" communications with analysts). When SEC disclosure requirements do not make silence an option, issuers may respond to the threat of unconstrained liability with defensive disclosures that "bury the shareholders in an avalanche of trivial information." *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 448–449 (1976).

In addition to detracting from the quantity and quality of information received by investors, securities class action abuse reduces the overall competitiveness of United States securities markets, as fear of potential liability deters foreign companies from listing on domestic stock exchanges. *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess. 221, 224 (1995) (statement of former SEC Chairman Richard C. Breeden) ("Based on conversations with potential issuers of securities all over the world, the fear of litigation inhibits foreign firms from participating in the U.S. market[s]."); see also PricewaterhouseCoopers LLP, *2004 Securities Litigation Study* 2 (Mar. 2005), available at http://www.10b5.com/2004_study.pdf (reporting that a record 29 foreign issuers were sued in domestic securities class actions in the 2004 fiscal year).

Ultimately, the decline in the efficiency and competitiveness of domestic capital markets and the concomitant increase in the expense of corporate governance mechanisms are absorbed by shareholders in the form of reduced earnings or passed along to the general public in the form of higher

prices. Abusive securities class actions thus amount to a litigation tax on capital formation and consumption that impedes job creation, injures investors, and weakens the Nation's economy.

B. The PSLRA Adjusted Litigation Incentives And Reoriented Securities Class Action Litigation To Deter Fraud And Compensate Investors Who Truly Were Injured

1. In the face of these abuses, Congress acted to broadly reform the process of securities litigation. This movement began with enactment of the PSLRA in 1995. That statute took far-ranging steps to rein in meritless litigation and increase issuers' incentives to disclose information to investors:

- To ensure that investors rather than their lawyers exercise primary control over litigation and eliminate the race-to-the-courthouse mentality that discouraged pre-filing investigation of complaints, the PSLRA requires national publication of a notice advising class members of the filing of a class action and selection of a "lead plaintiff," with a presumption that the most suitable plaintiff is the class member or group that has the largest financial stake in the litigation. 15 U.S.C. §§ 77z–1(a)(3)(B), 78u–4(a)(3)(B). The presumption is intended to "encourage institutional investors to take a more active role in securities class action lawsuits." H.R. Rep. No. 104–50, at 34; see also Weiss & Beckerman, *Let the Money Do the Monitoring*, 104 YALE L.J. 2053 (1995).[7]

[7] Because, prior to the PSLRA, the first law firm to file a complaint would be anointed lead counsel and thus garner the lion's share of any contingency fee recovery, the resulting race to the courthouse discouraged plaintiffs' counsel from fully investigating claims before filing suit. Law firms maintained a stable of profes-

- The PSLRA prohibits bonus payments to class representatives (*id.* §§ 77z–1(a)(4), 78u–4(a)(4)) and limits investors to serving as a class representative no more than five times during any three-year period. *Id.* §§ 77z–1(a)(3)(B)(vi), 78u–4(a)(3)(B)(vi).

- To better align the incentives of class counsel with the class, the PSLRA limits attorneys' fees to a reasonable percentage of the damages and prejudgment interest actually paid to the class. *Id.* §§ 77z–1(a)(6), 78u–4(a)(6).

- To reduce the "fraud by hindsight" problem (see generally Gulati, *et al.*, *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004)), the PSLRA creates a "safe harbor" for projections of future performance that were not knowingly false. 15 U.S.C. §§ 77z–2(c)(1)–(2), 78u–5(c)(1)–(2).

- The PSLRA imposes a heightened pleading standard to prevent plaintiffs from suing first and attempting to identify actionable fraud only after expensive fishing-expedition discovery. Plaintiffs

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sional plaintiffs – the "world's unluckiest investors" (H.R. Conf. Rep. No. 104–369, at 32 (1995)) – who would receive bonuses for lending their names to class action complaints that were filed within days or hours of any dramatic decline in share price. See *Reform Act Senate Hearings*, *supra*, at 118 (statement of Sen. Peter Domenici) (more than 20% of securities class actions filed within 48 hours of negative news); *1993 Senate Hearings*, *supra*, at 7–8 & Ex. 1 (letter from Melvyn I. Weiss to Sen. Donald W. Riegle) (reporting that over three-year period, out of 229 Rule 10b–5 actions filed by his firm, 157 filed within 10 days of major adverse disclosure by defendant). Predictably, many of the complaints were verbatim copies of those previously filed. See, *e.g.*, *In re Philip Morris Sec. Litig.*, 872 F. Supp. 97, 98 (S.D.N.Y. 1995), aff'd in part and rev'd in part, 75 F.3d 801 (2d Cir. 1996).

must identify each allegedly fraudulent statement and explain why it is fraudulent, and must state with particularity facts giving rise to a "strong inference" that the defendant acted with "the required state of mind." *Id.* § 78u–4(b)(2).

- The PSLRA mandates imposition of sanctions for violations of Rule 11 of the Federal Rules of Civil Procedure, with the presumptive award being the amount of defendants' attorneys' fees and costs for defending the suit. *Id.* §§ 77z–1(c), 78u–4(c).

- The PSLRA imposes a stay of discovery during the pendency of a motion to dismiss, unless the court finds that discovery is necessary to preserve evidence or prevent undue prejudice. *Id.* §§ 77z–1(b), 78u–4(b)(3). In combination with the heightened pleading standards, the discovery stay is intended to ensure that nonmeritorious complaints do not impose enormous litigation costs on defendants.

- The PSLRA codified the "loss causation" requirement; in addition to showing that fraud induced the purchase a security, plaintiffs must show that the fraud actually caused the security's price to be artificially inflated. 15 U.S.C. § 78u–4(b)(4); see also *id.* § 77*l*(b). Otherwise, private securities actions "would become an insurance plan for the cost of every security purchased in reliance upon a material misstatement or omission." *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983). See *Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005).

- To help prevent the prospect of massive damage awards coercing otherwise unjustified settlements,

the PSLRA replaced joint and several liability for peripheral defendants with proportionate liability if those defendants did not knowingly violate the securities laws. *Id.* §§ 77z–2(c)(2), 78u–4(g)(3), 78u–5(c)(2). To preclude a treble damage award under the Racketeering Influenced and Corrupt Organization Act of 1970, securities fraud was eliminated as a predicate for a civil racketeering claim, and mail and wire fraud may not constitute a predicate RICO offense if the underlying conduct would be actionable as securities fraud. 18 U.S.C. § 1964(c). And to increase the accuracy of damage awards, the PSLRA provided that damages must be measured by the difference between the price the plaintiff paid for the security and the mean trading price of the security during the ninety-day period after dissemination of corrective information to the marketplace. 15 U.S.C. § 78u–4(e)(1).

- In addition to addressing the litigation incentives of plaintiffs, defendants, and lawyers, the PSLRA strengthened other enforcement mechanisms. For example, it required firms auditing public companies to take certain measures to detect fraud and to disclose any unlawful acts they uncover (15 U.S.C. § 78j–1); the statute vested the SEC with the power to prosecute those who aid and abet violations of the securities laws. *Id.* § 78t(f).

2. The PSLRA had a limited but significant success in squeezing out abusive litigation while preserving the opportunity for plaintiffs to advance meritorious securities claims under federal law, thus rationalizing the system of securities litigation. The statute certainly did not close the courthouse door to plaintiffs: with the exception of a brief decline in litigation activity the year after the enactment of the PSLRA, the mean number of securities issuers sued each year has in-

creased to 258, a 33% increase over the pre-PSLRA average. See Securities Class Action Clearinghouse ("SCAC"), at http://securities.stanford.edu/.

Moreover, the dollar magnitude of settlements has increased. Eight post-PSLRA settlements have exceeded $500 million: the Enron and WorldCom litigations, while still pending, already have produced settlements of $7.16 billion and $6.128 billion, respectively; the Cendant litigation settled for $3.525 billion; AOL Time-Warner settled for $2.5 billion; parts of the IPO Allocation Litigation against numerous issuers settled for $1 billion; McKesson HBOC settled for $960 million; Lucent Technologies settled for $673 million; and Raytheon Corporation settled for $535 million. See SCAC Top Ten List, at http://securities.stanford.edu/top_ten_list.html.

Even adjusting for inflation and excluding the WorldCom partial settlement announced in May 2004, a record $2.881 billion in settlements were reached last year. Simons & Ryan, *Post-Reform Act Securities Settlements: Updated Through December 2004* 1, available at http://securities.stanford.edu/Settlements/REVIEW_1995-2004/Settlements_Through_12_2004.pdf. The total value of settlements has exceeded the $2 billion mark for the last five years. *Ibid.* This increase reflects not only a higher number of settlements, but also an increase in the average settlement size. While over 65% of settlements in 2004 were for less than $10 million, seven exceeded $100 million and the "percentage of 'mid-range' settlements between $60 million and $100 million" increased significantly. *Id.* at 3. Although the median settlement in the pre-Reform Act era was $3.5 million, Bajaj *et al.*, *Securities Class Action Settlements*, 43 SANTA CLARA L. REV. 1001, 1022–1023 (2003), the most recent figures indicate that the median settlement value has risen steadily, and reached $6.8 million in the first half of 2005. Buckberg, *et al.*, *supra*, at 4. One study attributes part of that increase to the increasing participation of institu-

tional investors as lead plaintiffs, which now occurs in 35% of post-PSLRA cases. Simons & Ryan, *supra*, at 9.

On the other hand, the dismissal rate of federal securities class actions also has risen. The percentage of securities fraud cases that were involuntarily dismissed (including through summary judgment) roughly doubled after enactment of the PSLRA. See Buckberg, *et al.*, *supra*, at 3; Painter *et al.*, *Private Securities Litigation Reform Act: A Post-Enron Analysis* 7–9 (2002) (gathering studies analyzing data through 2001), available at http://www.fed-soc.org/pdf/PSLRAFINALII.PDF. While pretrial dismissals disposed of 20.3% of securities cases filed between 1991 and 1995, that rate has increased to 39.3% of cases filed between 1996 and 2002. Buckberg, *supra*, at 3.

These contrasting sets of figures – more dismissals, but higher settlement values for cases that are not dismissed – suggest that the PSLRA has had some success. A higher dismissal rate indicates that frivolous actions are more likely to be dismissed, with surviving cases more likely to be those involving more substantial claims. Pritchard, *Should Congress Repeal Securities Class Action Reform?* 9 (Univ. of Mich. John M. Olin Center Working Paper No. 03–003, 2003) ("If only strong claims lead to settlements, class actions are producing more cost-effective deterrence."). See Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1477–1498 (2004) (canvassing the existing literature and concluding that it provides evidence that "frivolous suits existed prior to the PSLRA and that a shift occurred in the post-PSLRA period toward more meritorious claims"). Moreover, studies confirm that indicia of possible fraud – such as restatements of accounting results and allegations of insider trading – play a larger role in the filing and settlement of securities fraud class actions after the en-

actment of the PSLRA than before. See Simons & Ryan, *supra*, at 7; Pritchard, *supra*, at 11.[8]

C. The SLUSA Was Enacted To Prevent Frustration Of The PSLRA's Reforms

Prior to the enactment of the PSLRA, state securities laws – the subject of the SLUSA – had played virtually no role in class action litigation involving securities traded on national exchanges. But that changed as plaintiffs and their attorneys attempted to circumvent the PSLRA's reforms. The plaintiffs' bar had brought "essentially no significant securities class action litigation" in state courts before the effective date of the PSLRA. H.R. Rep. No. 105–640, at 10 (1998). In the two years after the enactment of the PSLRA, however, at least 104 state-law securities class actions were filed. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 WASH. U. L.Q. 645, 670 (1998). Congress heard

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[8] We note, though, that the pressure on corporations to settle regardless of the merits of the case remains high. The magnitude of the pressure to settle even the most frivolous of cases is illustrated by the fact that fewer than 1% of securities fraud class actions are ultimately taken to trial. See Painter *et al.*, *supra*, at 8. See Pritchard & Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act* 4 (Univ. of Mich. John M. Olin Center for Law & Economics, Working Paper 03–011, 2003); Black, *et al.*, *Outside Director Liability* 34 (Univ. of Mich. John M. Olin Center for Law & Economics, Working Paper No. 250, 2003) (finding only one securities case that proceeded to trial). The pressure on defendants is so great that, even when they do succeed in obtaining a dismissal with prejudice in the trial court, the risk of losing on appeal may lead to enormous settlements. For example, a securities class action defendant recently agreed to settle for $300 million even after prevailing in the trial court. See Weil, *Win Lawsuit—and Pay $300 Million*, Wall St. J., Aug. 2, 2004, at C3.

testimony that in California alone, about five times as many state securities class actions were filed in the first six months of 1996 than in the first six months of 1995, prior to the enactment of the PSLRA. H.R. Rep. No. 105–640, at 10 (1998); see also Radom, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39–Fall TEX. J. BUS. L. 295, 309–310 & nn. 97–98 (2003).

Predictably, the weaker cases, which would not pass muster in federal court after the PSLRA, were the ones filed in state court. See Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 307–318 (1998); SEC, Office of General Counsel, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, Apr. 1997, at 84 (noting that increase in filings of state securities class actions "may reflect a migration of weaker cases to state court"). Moreover, savvy plaintiffs' lawyers could magnify the coercive pressure to settle these strike suits by engaging in state-court forum shopping. See Chao, *Securities Class Actions and Due Process*, 1996 COLUM. BUS. L. REV. 547, 550–551 (describing the resulting "race to the bottom" settlement process in state courts); see also Garry *et al.*, *supra*, 49 S.D. L. REV. at 276 (2005) (noting increase in filings in Mississippi).[9]

The obvious effect of the movement of securities class actions to state court was to frustrate the PSLRA's purposes and to resurrect the abusive practices that Congress had sought to discourage. To offer just one example, the balkani-

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[9] Members of the plaintiffs' bar attempted to obtain the passage of state legislation that would have increased this substitution effect; an ultimately defeated ballot initiative in California would have transformed the state into a "Mecca" for securities class action litigation. See Walker, *Evaluating the Preemption Evidence: Have the Proponents Met Their Burden?*, 60 L. & CONTEMP. PROBS. 237, 241 (1997).

zation of securities law produced by the proliferation of state securities litigation threatened to render the safe harbor provision of the PSLRA a dead letter. See S. Rep. 105–182, at 4. The SEC warned that "[c]ompanies have been reluctant to provide significantly more forward-looking disclosures than they had prior to the enactment of the safe-harbor" (SEC, *supra*, at 3) because, in part, of "fear of state court liability, where forward looking statements may not be protected by the Federal safe harbor." *Id.* at 27. The data revealed that allegations in complaints filed in state court were more than twice as likely to be based on forward-looking statements than were complaints filed in federal court. *Id.* at 77 (25% of "stand-alone" state complaints (those filed without a parallel federal suit) "are based solely on failed forecasts (as compared to twelve percent at the federal level)").

This evidence of the migration of securities class action litigation to state court led Congress to enact the SLUSA. The statute's parallel provisions added to the Securities Act of 1933 and the Exchange Act of 1934 provide that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging," "in connection with the purchase or sale of a covered security," either "an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance * * *." 15 U.S.C. §§ 77p(b), 78bb(f)(1). Under the SLUSA, if such a class action is brought in state court, it may be removed to federal district court and thereafter dismissed. *Id.* §§ 77p(c), 78bb(f)(2).

There is no mystery about Congress's goal in this legislation: the SLUSA's preemption of state law was intended to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." Pub. L. No. 105–353, § 2(5), 112 Stat. 3227, 3227 (codified at 15 U.S.C. § 78a note). Representative Bliley, the House Manager, remarked that "[t]he premise of this

legislation is simple: *lawsuits alleging violations that involve securities that are offered nationally belong in Federal court.*" 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998) (emphasis added). See also H.R. Conf. Rep. No. 105–803, at 13 (1998) ("this legislation establishes uniform national rules for securities class action litigation involving our national capital markets").

D. Excepting State-Court "Holder" Suits From SLUSA Preemption Would Frustrate The Congressional Purpose

Against this background, it is manifest that the Second Circuit's decision, which allows state-law holder suits to proceed, is inconsistent with the central purpose of the SLUSA. Congress determined that the securities litigation process was rife with abuses that were harming issuers and shareholders alike, and reacted by promulgating the corrective rules of the PSLRA. When plaintiffs' counsel sought to circumvent those rules by bringing national securities class actions under state law – a species of suit that had virtually never before been seen – Congress responded by providing broadly in the SLUSA that class actions involving nationally traded securities should proceed only under federal law. For several reasons, the decision below, which again allows plaintiffs' lawyers to avoid the PSLRA's requirements by bringing a novel type of national class action, cannot be squared with that intent.

1. To begin with, holder suits present exactly the sorts of dangers that led to enactment of the PSLRA in the first place. Indeed, this Court imposed the purchaser/seller requirement on the cause of action implied under Rule 10b–5 precisely because holder actions are *especially* susceptible to use as an abusive vehicle to extract extortionate settlements. The Court examined this point at some length in *Blue Chip Stamps*, explaining that, in contrast to purchasers and sellers, "a putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as

the loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective analysis." 421 U.S. at 734–735.

This means that a holder action "will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of other than by settlement." *Blue Chip Stamps*, 421 U.S. at 742. A holder suit also necessarily "would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony," a circumstance where "dangers of * * * abuse appear to exist * * * to a peculiarly high degree." *Id.* at 743. And this problem would be compounded because "[t]he jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant." *Id.* at 746.

And that is not the end of the abuse made possible by holder actions. In the absence of a rule that permits only purchasers and sellers to bring private securities suits,

> bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused non-selling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow restrospectively golden opportunities to pass.

Blue Chip Stamps, 421 U.S. at 747. Holder suits thus "would appear to encourage the least appealing aspect of the use of the discovery rules" (*id.* at 741) and would "'lead to large judgments, payable in the last analysis by innocent investors,

for the benefit of speculators and lawyers.'" *Id.* at 739 (quoting *Texas Gulf Sulphur*, 401 F.2d at 867 (Friendly, J., concurring)); see also *Dura*, 125 S. Ct. at 1631–1632 (emphasizing that a decline in stock price "after the truth makes its way into the market place * * * may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price"); *Holmes*, 503 U.S. at 272–273 (precluding recovery on behalf of customers who had not themselves traded in manipulated securities but whose brokers were rendered insolvent by doing so, because "[i]f the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.").

2. In addition, allowing holder claims to proceed would be unlikely either to deter fraud or to benefit shareholders. As a logical matter, holders of securities, viewed as a class, cannot be injured. A holder claim assumes that fraud led the class to keep a stock rather than sell it so as to take advantage of an artificially inflated stock price. But if the fraud had not occurred, the stock price would not have been inflated – especially if, as the holder claim implies, shareholders would have sold their shares had accurate information been released to the market – and so there would have been no profits from the sale. See, *e.g.*, *Arent* v. *Distribution Scis., Inc.*, 975 F.2d 1370, 1374 (8th Cir. 1992) ("Plaintiffs were not harmed because they were unable to realize the true value of their stock – they were harmed because the true value of their stock was zero."); *Crocker* v. *FDIC*, 826 F.2d 347, 351 (5th Cir. 1987) (absent fraud, "there would have been no market for the stock at the artificially high price," and "[w]ithout such a

market, the [holder's] envisioned 'profit opportunity' evaporates into hardly more than an illusion").

By the same token, "[t]he deterrent effect is weak" when "the merits of claims" are "irrelevant to their initiation or settlement values," as promises to be the case with state-law holder damages suits. Winter, *supra*, 42 DUKE L.J. at 952. And truly meritorious claims, of course, can be brought in federal court as traditional purchaser/seller suits; holder actions are premised on a drop in stock price, and the share price can change only if there are purchasers and sellers who could themselves pursue "fraud on the market" claims. See *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 245–247 (1988).

3. Viewed in this light, state-law holder suits present all of the dangers that prompted enactment of the PSLRA. Such suits, of course, will proceed outside of the PSLRA's rules: they may, for example, allow for joint and several liability and punitive damages; may premise liability on forward-looking statements; will not make use of the discovery stay and pleading standards that have curbed abusive discovery; and will not apply the lead plaintiff rules that discourage the "race to the courthouse door." There is every reason to believe that state-law holder suits will, for this reason, become the plaintiffs' vehicle of choice. See Pet. 17 n.5 (gathering 24 such cases); see also H.R. Conf. Rep. No. 105–803, at 14–15 (noting plaintiffs' attorneys' attempt to "circumvent the [PSLRA's] provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available"). After all, virtually any purchaser or seller claim could, if gerrymandered as to the timing of the class period and tweaked a bit in its allegations, be stated as a holder suit.

As a consequence, there is little doubt that, under the Second Circuit's approach, holder suits will impose significant costs on defendants through fishing-expedition discov-

ery and interruption of business, and will pose the danger of enormous liability. Such suits accordingly will lead to substantial settlements, even when (as often will be the case) they are wholly lacking in merit. They will discourage corporate disclosures of information. They are unlikely to do investors any good. And they will impose heavy costs on all participants in the securities markets. Indeed, the only winners in this system of blackmail suits and windfall settlements will be the lawyers.

The Second Circuit's holding thus leads to a bizarre and anomalous result. For more than fifty years, the federal courts have precluded holder suits under Rule 10b–5 because such actions are so easily abused. See *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952). The PSLRA and the SLUSA were designed to *tighten* the federal securities rules to further combat meritless litigation. Yet the court of appeals read the SLUSA to have excluded from the scope of the PSLRA's substantive provisions, alone among the favored weapons in the strike suit arsenal, this *most* abusive type of claim. It seems plain that Congress could not have had any such intent.

4. Finally, we note that, wholly apart from private damages litigation, significant deterrents to fraud affecting holders of securities are in place. SEC regulations impose stringent reporting obligations on corporations, subject to SEC enforcement proceedings. Corporations must file quarterly and annual financial statements, which executives now must certify under threat of criminal penalty and disgorgement of their compensation and stock trading profits. 15 U.S.C. §§ 7241, 7243; 18 U.S.C. § 1349. Issuers also must file Form 8–K reports on any of a host of material corporate events, including agreements, acquisitions, disposition of assets, off-balance sheet financial obligations, and changes in officers or directors. SEC, Release No. 33–8400, 69 Fed. Reg. 15594 (2004).

The powers of the SEC and Department of Justice to enforce these corporate disclosure obligations are substantial. The Commission may obtain injunctive relief, cease-and-desist orders, orders barring or suspending individuals from serving as an officer or director of an issuer of securities, and large civil penalties, including disgorgement of any gain. 15 U.S.C. §§ 78u, 78u–3. Under the Sarbanes-Oxley Act, the SEC may earmark penalties and amounts disgorged "for the benefit of the victims" of the violation. 15 U.S.C. § 7246(a).

A person who willfully and knowingly makes a false or misleading statement of material fact may also be criminally liable and is subject to imprisonment for 20 years and multi-million dollar fines. *Id.* § 78ff. The Securities Act authorizes many similar remedies for misstatements made in connection with the registration of securities, for which liability may be established without proof of scienter. *Id.* §§ 77t, 77y.

The SEC does not shy away from invoking these powers. During fiscal year 2004 alone, the SEC initiated 973 investigations of possible violations of the securities laws and brought 264 injunctive actions and 375 administrative proceedings against issuers and financial services providers – far more than the 236 private securities actions filed in federal court in 2004 (see SCAC, *supra*), and greatly in excess of the number of state-law holder actions over the past several years. The Commission obtained orders requiring the disgorgement of $1.9 billion and the payment of $1.2 billion in penalties.[10] The Department of Justice's Corporate Fraud Task Force has charged over 900 defendants since it was

[10] SEC 2004 Annual Report app. C at 3, 21, available at http://www.sec.gov/about/secpar/secpar04stats.pdf. Details on recent settlements may be found on the SEC's website.

formed in July 2001, and has obtained over 500 guilty pleas and convictions.[11]

State prosecutors and blue-sky officials bring their own overlapping civil and criminal enforcement actions. Among state securities law enforcers, for example, the New York Attorney General alone has reported substantially more than a billion dollars in recent settlements with financial services companies.[12]

Financial services industry Self Regulating Organizations ("SROs") also enforce regulations that implement and supplement the securities laws. In 2004, the National Association of Securities Dealers barred 454 individuals from the securities business, suspended 379 others, and expelled 22 firms.[13] The New York Stock Exchange brought 195 cases of rules violations against members that year.[14]

Securities market participants are thus policed by an array of federal and state government powers (both civil and criminal), SRO sanctions, and, of course, civil liability under the federal securities laws in actions conducted according to

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[11] See Second Year Report to the President: Corporate Fraud Task Force 2.3 (2004), at http://www.usdoj.gov/dag/cftf/2ndyr_fraud_report.pdf.

[12] See http://www.oag.state.ny.us/press/2005/jul/jul20a_05.html ($125 million settlement in mutual fund market timing case); *id.* at feb/Banc.pdf, at 35 ($375 million settlement in similar case); *id.* at Columbia.pdf, at 25 ($140 million settlement); http://www.oag.state.ny.us/investors/alliance_cap_mgmt_aod.pdf, at 22 ($250 million settlement); *id.* at jcm/aod.pdf, at 9 ($100 million settlement); http://www.oag.state.ny.us/press/2002/may/may21a02.html ($100 million settlement in analyst conflict of interest case).

[13] See http://www.nasd.com/web/idcplg?IdcService=SSGETPAGE&nodeId=749&ssSourceNodeId=6.

[14] http://www.nyse.com/regulation/howregworks/1022221394131.html.

the standards prescribed by Congress. Together, these checks effectively curb unlawful practices and compensate injuries. Given the availability of these remedies, which deter and punish misconduct and compensate those who truly are its victims, there is no reason for this Court to permit state holder actions to unravel the litigation reforms implemented by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfuliy submitted.

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No. 04-1371

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

SHADI DABIT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PHILLIP GOLDSTEIN AND BULLDOG INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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December 19, 2005

QUESTION PRESENTED

Whether SLUSA preempts claims brought by holders of securities based upon misrepresentations, omissions, or manipulation, notwithstanding SLUSA's language limiting preemption to claims "in connection with the purchase or sale of a covered security," and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

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INTEREST OF AMICI CURIAE[1]

Bulldog Investors, founded in 1993, is a group of private investment funds that invest in registered closed-end mutual funds and other publicly traded companies. Bulldog Investors is a leader in shareholder activism as an investment strategy.

Phillip Goldstein is a co-founder and a principal of Bulldog Investors. He has served as a director of a number of closed-end funds and is currently a director of the Mexico Equity & Income Fund, Brantley Capital Corporation, the Emerging Markets Telecommunications Fund and the First Israel Fund. Mr. Goldstein is a widely-quoted expert on value investing, shareholder rights, and corporate governance.

SUMMARY OF ARGUMENT

Holder claims represent a residual but important class of cases which arise exclusively under state law. The kind of injury true holders typically sustain occurs through acts of corporate misfeasance or malfeasance; such injuries, being derivative in nature, are redressable under state corporation law through shareholder derivative suits. On occasion, however, securities holders are injured directly and when they are, their only recourse is direct action for damages under state law. Federal securities laws provide no remedy to holders who are not injured through their purchase or sale of a security. Similarly, state corporation law offers holders no remedy in the form of a derivative action when their injury is a direct one not derivative of an injury to the corporation itself.

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[1] This brief of *amici curiae* is submitted on behalf of Bulldog Investors and Phillip Goldstein. The parties have consented to the filing of this brief in letters filed with the Clerk. In accordance with Rule 37.6, counsel states that this brief was authored by counsel and was not authored in whole or in part by counsel for any party. No person or entity, other than *amici* and their counsel submitting this brief on behalf of *amici*, made a monetary contribution to the preparation or submission of the brief.

Holders of a security are, on occasion, the investors most severely injured by the kind of conduct the federal securities laws proscribe. The mutual fund scandal brought to light in 2003 is a perfect example of a situation in which holders are injured to a much greater degree by wrongdoing than are purchasers or sellers. As one of the district judges presiding over pending litigation arising out of that scandal wrote recently, denying holders the right to sue "would have the supremely ironic effect in this case of discriminating against victims who suffered the greater injury." *In re Mutual Funds Inv. Litig.*, 384 F.Supp.2d 845, 854 n.6 (D. Md. 2005). The Securities Litigation Uniform Standards Act of 1998 (SLUSA) does not mandate—indeed, properly construed does not permit—such a "supremely ironic effect."

The present case also demonstrates the incongruity of an interpretation of SLUSA which would deny holders any remedy under either federal or state law. Customers whom Merrill Lynch fraudulently induced to purchase junk stocks may seek redress for their injuries under the federal securities laws. Holders like Shadi Dabit, on the other hand, whom Merrill Lynch fraudulently induced to *retain* junk stocks have only those remedies that state law may grant him. Holders like Mr. Dabit are no less worthy victims than defrauded purchasers and their claims present no difficulties of proof that do not also burden purchaser plaintiffs. Yet if the Second Circuit's interpretation of SLUSA is rejected and the Seventh Circuit's accepted, defrauded purchasers will have their day in federal court, while defrauded holders will be shut out of all courts, state and federal.

There is accordingly no legitimate reason to construe the statutory language of SLUSA, which amends the 1934 Act, any differently than the identical language found in section 10(b) of the same Act. To interpret the phrase narrowly in section 10(b) (denying holders a federal cause of action) but broadly in SLUSA (preempting holders' state law causes of action) would arbitrarily extinguish *all*

holder claims of every kind, state or federal. Such a result is considerably broader than the effect SLUSA has on the claims of purchasers and sellers. Even though SLUSA preempts a purchaser's and seller's state law claims, purchasers and sellers may still assert their claims under federal law; if they cannot plead such claims in compliance with the requirements of PSLRA, then their claims are presumably the kinds of "meritless strike suits" Congress intended SLUSA to eliminate. Nothing in SLUSA's legislative history even remotely suggests that Congress had holder claims in mind when it enacted SLUSA, much less that Congress intended the wholesale obliteration of all holder claims regardless of their merit.

There is no legitimate reason to construe the operative language of SLUSA, which amends the Securities Exchange Act of 1934 Act, any differently than the identical language found in section 10(b) of the same Act. To interpret the phrase narrowly in section 10(b) (denying holders a federal cause of action) but broadly in SLUSA (preempting holders' state law causes of action) would arbitrarily extinguish *all* holder claims of every kind, state or federal. Such a result is considerably broader than the effect SLUSA has on the claims of purchasers and sellers. Even though SLUSA preempts a purchaser's and seller's state law claims, purchasers and sellers may still assert their claims under federal law; if they cannot plead such claims in compliance with the requirements of PSLRA, then their claims are presumably the kinds of "meritless strike suits" Congress intended SLUSA to eliminate. Nothing in SLUSA's legislative history even remotely suggests that Congress had holder claims in mind when it enacted SLUSA, much less that Congress intended the wholesale obliteration of all holder claims regardless of their merit.

The Second Circuit's conclusion that SLUSA does not preempt claims alleging fraud or manipulation in connection with the *retention* of securities is consistent with the historically limited reach of the federal securities law; is consistent with SLUSA's text, purpose and legislative his-

tory; is consistent with the applicable rules of statutory construction; and is consistent with the decisions of the overwhelming majority of federal courts to have addressed the issue. The decision below should accordingly be affirmed.

ARGUMENT

I. SLUSA'S TEXT, ITS LEGISLATIVE HISTORY AND RUDIMENTARY RULES OF STATUTORY CONSTRUCTION POINT TO THE CONCLUSION THAT SLUSA DOES NOT PREEMPT HOLDER CLAIMS.

A. The States have traditionally regulated securities transactions, and for more than sixty years federal securities law supplemented such state authority which Congress explicitly preserved and protected.

Prior to 1933, every aspect of securities regulation lay within the exclusive domain of the States. "Private rights of action, at common law and in equity, for persons injured in securities transactions preceded state statutes regulating the sale of securities, and many of those remedies still exist." Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 Cornell L. Rev. 1, 20 (1998) (hereinafter "Painter, *Responding*"). Shareholders were first permitted to band together against corporate managers in class actions under state law. *Id.* at 21-22. In the early twentieth century, States adopted Blue Sky laws governing securities transactions. *Id.* at 21. Limitations on the States' interstate authority hindered the effectiveness of state laws to combat securities abuses, however. "For example, because state securities commissioners could not extend their authority across state lines, state securities laws could not control two major waves of securities frauds, which took place from 1917 to 1920 and in the late 1920s." *Id.* at 22-23.

In the aftermath of the 1929 stock market crash, Congress undertook to supplement state law by regulating interstate sales of securities through enactment of the Securities Act of 1933 ("1933 Act") and Securities Exchange Act of 1934 ("1934 Act"). In both statutes, Congress expressly preserved state law. 1933 Act § 16, 48 Stat. 74, 84; 1934 Act § 28, 48 Stat. 881, 903. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 182 (1979) (savings clause served "to protect, rather than to limit, state authority"). This dual state and federal regime for the regulation of securities transactions endured from 1933 until the mid-1990's. Painter, *Responding*, 84 Cornell L. Rev. at 30-31.

The 1933 and 1934 Acts, which govern interstate sales of securities are the two major exceptions to the general rule that otherwise leaves matters of corporate law to the States. Congress has never seriously considered adopting a federal corporate law, and none of the legislation Congress has since enacted has ever purported to change this arrangement, including the reform measures of the 1990's. Painter, *Responding*, 84 Cornell L. Rev. at 15 (discussing failed legislative proposals to federalize broad segments of corporate law).

Thus, for over sixty years federal securities law augmented state law. Congress provided a private right of action under the 1933 Act for claims reaching fraud "in the offer of sale" of securities, with respect to which both state and federal courts may exercise jurisdiction. 15 U.S.C. § 77e. Congress explicitly prohibited the removal of 1933 Act cases from state to federal court. 15 U.S.C. § 77v. The 1934 Act provided additional remedies and included § 10(b), "a catch-all clause to prevent manipulative devices," pursuant to which the federal courts later found an implied right of action. Testimony of Thomas G. Corcoran, Hearing on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 115 (1934) (discussing 9(c) which became § 10(b) of the 1934 Act). Congress granted federal courts exclusive jurisdiction over 1934 Act

claims. As noted above, however, Congress explicitly preserved state law in both the 1933 and 1934 Acts.

B. Congress employed § 10(b)'s extensively litigated "in connection with the purchase or sale" language to define SLUSA's pre-emptive scope.

It is against the backdrop of more than sixty years of dual state and federal regulation of securities transactions that Congress enacted SLUSA. "[I]n 1996 much of the dual-registration regime was dismantled by a Republican controlled Congress committed to reducing the regulatory burden on business. Pursuant to the National Securities Markets Improvement Act of 1996 ('1996 Act'), state blue sky laws requiring registration or merit qualification no longer apply to 'covered securities' ...." Painter, *Responding*, 84 Cornell L. Rev. at 29-30. The passage of SLUSA in 1998 preempted areas of state law.

Even the Seventh Circuit agrees that the Congressional findings in SLUSA and SLUSA's legislative history make unmistakably clear Congress' purpose in enacting SLUSA: to close a perceived "federal flight" loophole in the Private Securities Litigation Reform Act of 1995 (PSLRA). *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 482 (7th Cir. 2005) ("SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the Private Securities Litigation Reform Act of 1995."). Specifically, Congress was concerned that securities class action lawyers and their clients were evading the PSLRA's procedural reforms by recasting traditionally federal purchaser or seller claims as claims based upon state law and filing them in state courts where the PSLRA does not apply. In response, Congress enacted SLUSA to preempt such repackaged state law claims. SLUSA also makes any such claims filed in state court removable to federal court. SLUSA thus makes the remedies provided under federal securities laws the sole remedies available to most securities purchasers and sellers who file their claims as class